VIJAYALAKSHMI DEVI NADCHATIRAM

v.

SARASWATHY DEVI NADCHATIRAM

FEDERAL COURT, KUALA LUMPUR
WAN ADNAN ISMAIL CJ (MALAYA)
MOHAMED DZAIDDIN ABDULLAH FCJ
ABU MANSOR ALI FCJ
[CIVIL APPEAL NO: 02-11-98 (N)]
13 JULY 2000

LEGAL PROFESSION: *Practice of law - Practice and etiquette - Whether advocate and solicitor ought to be barred from representing brother/sister/niece - Whether advocate and solicitor has personal relationship with persons she represented - Advocate and solicitor was named as beneficiary to disputed subject matter in the action - Whether advocate and solicitor has direct pecuniary interest - Legal Profession (Practice and Etiquette) Rules 1978, rr. 3 & 27(a)*

STATUTORY INTERPRETATION: *Construction of statutes - Purposive approach - Whether court errs in law in interpretation - Approach to be taken - Meaning of "personal relationship" and "directly pecuniarily interested" - Legal Profession (Practice and Etiquette) Rules 1978, rr. 3 & 27(a)*

In the originating summons, the appellant prayed that the respondent was prohibited from acting as the advocate and solicitor for her brother, sister and niece in various pending civil actions pursuant to rr. 3(a)(b)(ii) and 27 Legal Profession (Practice and Etiquette) Rules 1978 ("LPR 1978"). Counsel for the appellant submitted *inter alia* that the respondent ought to be barred from so acting by reason of embarrassment as the respondent is personally related to the parties in those civil actions. Furthermore, it was contended that the respondent had a pecuniary interest in certain disputed subject matters since she was named as a beneficiary. The trial judge allowed the application. The matter went to the Court of Appeal, where the court allowed the respondent's appeal. The appellant then appealed to the Federal Court. The issue raised for consideration was whether the Court of Appeal was correct in law in their interpretation of the proper construction of rr. 3 and 27(a) of the LPR 1978.

Held:
Per Abu Mansor Ali FCJ

[1] The Court of Appeal had erred in law in the interpretation of rr. 3 and 27(a) LPR 1978 by not focussing their attention to the elementary tenet of construction in finding the meaning of "personal relationship" and "pecuniary interest". Their approach should have been to find out the purpose of the said provisions.

[2] From the evidence adduced, it was clear and could not be denied that the respondent was personally related to the parties she was representing.

[3] Having regard to the pecuniary interest she was alleged to have in those disputed matters, r. 27(a) LPR 1978 was applicable in this instant.

[4] Thus, in view of her personal relationship and of her pecuniary interest, the respondent was prohibited from representing those persons in the civil suits concerned.

[Appeal allowed; Decision of High Court restored except suit no. 22-54-95.]

*[**Bahasa Malaysia** Translation of Headnotes]*

Dalam saman pemulanya, perayu memohon agar responden dihalang dari bertindak sebagai peguambela dan peguamcara bagi saudara lelakinya, saudara perempuannya dan anak saudaranya di dalam beberapa tindakan sivil selaras dengan k. 3(a)(b)(ii) dan k. 27 Kaedah-Kaedah Profesyen Undang-undang (Amalan dan Etika) 1978 ("KPU 1978"). Peguam perayu menghujahkan antara lain bahawa responden wajar dihalang dari bertindak sebagai peguambela dan peguamcara kerana ianya memalukan memandangkan responden mempunyai hubungan peribadi dengan pihak-pihak dalam tindakan-tindakan sivil tersebut. Selanjutnya, adalah dikatakan bahawa responden mempunyai kepentingan wang dalam halperkara yang dipertikaikan kerana beliau telah dinamakan sebagai seorang benefisiari. Hakim bicara membenarkan permohonan tersebut. Perkara ini dibawa ke Mahkamah Rayuan dimana mahkamah membenarkan rayuan responden. Perayu kemudiannya merayu ke Mahkamah Persekutuan. Isu yang dibangkitkan untuk pertimbangan adalah samada Mahkamah Rayuan betul disisi undang-undang dalam mentafsirkan k. 3 dan k. 27(a) KPU 1978.

Diputuskan:
Oleh Abu Mansor Ali HMP

[1] Mahkamah Rayuan telah khilaf dalam mentafsirkan k. 3 dan k. 27(a) KPU 1978 kerana tidak menumpukan perhatian mereka kepada rukun asas tafsiran dalam memutuskan maksud "hubungan peribadi" ("personal relationship") dan "kepentingan wang" ("pecuniary interest"). Pendekatan mereka sepatutnya dengan mencari tujuan peruntukan-peruntukan tersebut.

[2] Daripada keterangan yang telah dikemukakan, adalah jelas dan tidak dapat dipertikaikan bahawa responden mempunyai hubungan peribadi dengan pihak-pihak yang diwakilinya.

[3] Setelah diperhatikan kepentingan wang yang kononnya ada pada responden dalam perkara-perkara yang dipertikaikan, k. 27(a) KPU 1978 adalah terpakai dalam kes semasa.

[4] Oleh yang demikian, memandangkan hubungan peribadi dan kepentingan wang tersebut, responden adalah dihalang dari bertindak sebagai peguambela dan peguamcara kepada pihak-pihak yang diwakilinya dalam tindakan-tindakan sivil yang berkenaan.

[Rayuan dibenarkan; Keputusan Mahkamah Tinggi dikembalikan kecuali suit no. 22-54-95.]

Case(s) referred to:
Black v. Taylor [1993] 3 NZLR 403 ***(foll)***
Datuk Syed Kechik Syed Mohamed & Anor v. The Board of Trustees of the Sabah Foundation & Ors and another application [1999] 1 CLJ 325 ***(refd)***
Haji Abdul Ghani Ishak & Anor v. PP [1981] 2 MLJ 230 ***(refd)***

Legislation referred to:
Courts of Judicature Act 1964, s. 96(a)
Interpretation Acts 1948 & 1967, s. 17A
Legal Profession (Practice and Etiquette) Rules 1978, rr. 27(a), 3(b)(ii)

Other sources referred to:
Concise Oxford Dictionary
Jowitt's Dictionary of English Law

For the appellant - Malik Imtiaz Sarwar (Satharuban Sivasubramaniam & Mathew Thomas Philip with him); M/s Satha & Co
For the respondent - N Saraswathy Devi (RS Sodhi & Shyamala Devi Alagendra with her); M/s N. Saraswathy Devi
For the Bar Council - Sulaiman Abdullah (Anita Sockalingam with him)

[Appeal from Court of Appeal, Kuala Lumpur; Civil Appeal No: N-02-251-1996]

Reported by Izzaty Izzuddin

JUDGMENT

Abu Mansor Ali FCJ:

On 18 August 1998 this court granted the appellant (plaintiff in the lower court) leave to appeal. It was against the decision of the Court of Appeal given on 10 November 1997 in Mahkamah Rayuan Civil Appeal No. N-02-251-96 which had allowed the appeal of the respondent. The leave granted was limited to the following issue:

> Whether the Court of Appeal was correct in law in their interpretation of the proper construction for Rules 3 and 27(a) of the Legal Profession (Practice & Etiquette) Rules 1978 and their application of the same against the respondent, in particular:
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> (a) the proper construction and meaning of the words "personal relationship" within rule 3 of the Legal Profession (Practice & Etiquette) Rules 1978; and
>
> (b) the proper construction and meaning of the words "directly pecuniarily interested" within rule 27(a) of the Legal Profession (Practice & Etiquette) Rules 1978.

This court also in granting leave gave consequential orders that the decision of the Court of Appeal was to be suspended and further that the cases in which the respondent or her legal assistants are involved as advocates or solicitors, were postponed until after the disposal of this appeal to this court and lastly this court ordered costs in the cause.

History

In the court below, the appellant Vijayalakshmi Devi was the plaintiff. She is the sister of the respondent Datin Saraswathy Devi who officiates as an advocate and solicitor.

The other parties involved herein are:

(1) Jegadevan who is the appellant's brother. The appellant is the plaintiff in Civil Suits Nos. 24-346-92 (for convenience we call "Action No. l") and 22-61-93 (we call "Action No. 2") and the said Jegadevan is the defendant.

(2) Suseela Devi is the appellant's sister. Suseela is involved in Seremban High Court Civil Suit No. 22-95-93 (we call "Action No. 3") and Shanti Thiruchelvasegaram is her niece in the Kuala Lumpur Civil Suit No. S2-22-562-93 (we call "Action No. 5"). They are plaintiffs there and the appellant was the defendant with her husband. In Suit No. 22-54-95 (we call "Action No. 4") Vijayalakshmi is not even a party to the suit and the Court of Appeal rightly held she had no *locus standi.*

In the lower court, the appellant in her originating summons applied that the respondent, firm of advocates and solicitors or her legal assistants cease to act as advocates and solicitors for:

(l) Jegadevan in cases Nos. 24-346-92, 22-61-93, 02-175-94, 02-260-94 and 02-483-95;

(2) Suseela Devi in case No. 22-95-93 and case No. 22-54-95;

(3) Shanti d/o Thiruchelvasegaram in case No. S2-22-562-93 and

(4) Any of the brothers and sisters of the defendant in any proceedings relating to the Estate of Nadchatiram and of Nadchatiram Realties (1960) Sdn. Bhd. (in liquidation) where Vijayalakshmi is a party to the proceedings.

At that hearing before the lower court, the Bar Council was also represented after the plaintiff had duly served them and was allowed to be present by the learned trial judge over-ruling the protest of the defendant therein.

The learned trial judge granted all the orders sought against the respondent thus preventing her and her firm from acting in all the matters referred to in the judge's order. The respondent then appealed to the Court of Appeal. The Court of Appeal, after hearing arguments, allowed the respondent's appeal and the appellant now appeal to this court on the questions already framed.

Rule 3 of the Legal Profession (Practice and Etiquette) Rules 1978 (hereinafter called "The Practice and Etiquette Rules") provides:

3 (a) An advocate and solicitor shall not accept a brief if he is or would be embarrassed.

(b) An embarrassment arises –

(i) ...

(ii) where there is some personal relationship between him and a party or a witness in the proceedings.

What did the Court of Appeal decide in their judgment on r. 3(a) of the Practice and Etiquette Rules? The Court of Appeal at p. 34 of the Rekod Rayuan Jilid I held:

A personal relationship between a solicitor and his client can only mean a relationship (meaning an association) which is personal between them. A working relationship between partners of a firm is not a personal relationship, so that a lawyer can always act for his firm. A sexual relationship between two people is a personal relationship. But a solicitor and client relationship is not a personal relationship. However, there would be a personal relationship between them if their association is something which is more than that of a professional one. There is nothing to suggest that the relationship between Saraswathy and her clients is anything but a professional one which is that of a solicitor and client relationship. There is no personal (meaning individual; private; one's own) relationship between Saraswathy and her kin which is outside that of a professional relationship of solicitor and client. *Rule 3 of the Practice and Etiquette Rules does not prohibit a solicitor from acting for his client merely because he is related by blood to his client. For the prohibition to apply, the relationship must be that of a personal one, meaning an individual or a private relationship which is beyond that of a solicitor and client relationship".* (emphasis added)

What we have to answer as already framed is the correctness of the Court of Appeal, in law, in their interpretation of the proper construction of r. 3(a) of the Practice and Etiquette Rules.

Reading r. 3(a) of that Practice and Etiquette Rules, it is clear how the rules are meant to regulate the conduct of advocates and solicitors. It has been so drafted to regulate rules, and by which the members of that profession are injuncted from accepting a brief if he would thereby be embarrassed by it. The rules had defined what amounts to embarrassment. The meaning of embarrassment is spelt out in r. 3(b)(ii) of the rules "where there is some personal relationship between him (the advocate or solicitor) and a party or a witness in the proceedings".

What does come within the ambit of "personal relationship"? By its ordinary *Concise Oxford Dictionary's* meaning of relationship is "the fact or state of being related" and "personal" is relating to or connected with the person. Or to take the meaning of "relation" in the *Jowitt's Dictionary of English Law* it means "a general word meaning *prima facie* next-of-kin of any degree or colloquially, kindred of all degrees."

Mr. Malik Imtiaz Sarwar, for the appellant, urged on us in his submission, that the objection of the appellant's application has been to disqualify the respondent in acting or representing the litigants in each of the four actions by reason of the fact that the respondent has a personal relationship to the person or persons whom she wants to represent or was representing. Counsel submitted that in Action No. 1, it was filed by the appellant herein against the brother Jegadevan. He is also brother to the respondent and respondent wishes to represent him.

In Action No. 1 and No. 2 it involves, the truth of which is the subject document of litigation. The document purported to be a settlement agreement (see p. 513 of the record of appeal). It is to be noted that the respondent appears as the 5th party in that agreement (9th line from the top "Datin Saraswathy Devi").

At p. 515 of the record of appeal it says Datin Saraswathy, the 5th defendant, is the 5th party to the agreement. This has been put in issue in Action No. l.

Then at p. 473 of the record of appeal there is alleged distribution of family property; the letter was written by the mother of both appellant and respondent who was the accountant. At p. 473 of the record of appeal respondent is alleged to have 35 shares in the family company, the truth of which this court will only know when matters are fully tried and we express no opinion herein. Then appellant's counsel submitted at p. 474 item 5 of the record of appeal that the respondent is alleged to have 1/4 share of a lot of land approximately 50 acres. Again this is a matter of dispute of course.

In Action No. 2 at p. 422 of the record of appeal, the appellant is the plaintiff and the defendant is the sister of the respondent and the appellant. At p. 473 of the record of appeal it is seen that the action is brought against the defendant in relation to shares purportedly held in trust by the defendant *inter alia* for the respondent (see letter at p. 473 of the record of appeal - letter 70 shares held by Suseela Devi).

Appellant's counsel further submitted in Action No. 3 (see p. 219 of the record of appeal) and we are referred to the supporting affidavit of the appellant - para. 9.1 thereof.

Jegadevan as we have stated somewhere is the brother of the respondent and of the appellant.

Clearly the respondent has a personal relationship to the defendant.

Counsel submitted in Action No. 4 at p. 220 para 10.1 of the record of appeal, the pleadings (writ at p. 527 of the record of appeal) disclosed that the plaintiff therein is the daughter of the appellant and niece of the respondent. The plaintiff therein is suing both the mother and father as 2nd defendant and 3rd defendant who are the appellants. The respondent is under a personal relationship without any dispute.

Learned counsel for the appellant in her originating summons prayed that respondent be disqualified on the ground that respondent is barred from so acting by reason of embarrassment as the respondent is personally related to the clients or would be clients in Actions No. 1, 2, 3 and 4 by reason of r. 3(a)(b)(ii) and in Actions 1 and 2, the respondent is pecuniarily interested by reason of r. 27(a) of the Legal Profession (Practice and Etiquette) Rules 1978.

On the subject of personal relationship, learned counsel cited to us the authority of *Black v. Taylor* [1993] 3 NZLR 403, a Court of Appeal decision in New Zealand. In this case a solicitor had previously acted for several members of a family including the plaintiff and the deceased. The plaintiff brought proceedings against the estate of the deceased alleging breach of an agreement etc. The plaintiff sought an injunction to restrain the solicitor from acting as either solicitor or counsel for the estate. The application was made on the ground of conflict of interest based on the solicitor's receipt of confidential information relevant to the issues in the proceeding. The High Court had made a declaration that the solicitor should not act further as counsel in the proceeding. The solicitor appealed and the plaintiff cross-appealed. The Court of Appeal held the court's power to restrain a barrister from acting, arose from the court's inherent jurisdiction where the interests of justice so required. It may further held that the court may prevent a barrister acting as counsel in a matter in which he had a conflict of interest, or in which he appeared to have a conflict of interest such that justice would not be seen to be done.

As for the meaning of pecuniary interest, counsel cited to us the case of *Haji Abdul Ghani bin Ishak & Anor v. Public Prosecutor* [1981] 2 MLJ 230 where at p. 235 where Wan Yahya J (as he then was) after discussing other relevant authorities said:

> In my view any interest relating to money or money's worth, any interest that could be converted into money, or any interest the object of which is to make money falls in the category of pecuniary interest.

Counsel urged that this definition be used.

Learned counsel further submitted that by reason of pecuniary interest in the matters in Actions No. 1, 2, 3 and 4 the respondent is caught by the operation of r. 27(a) of the Practice and Etiquette which reads:

> 27(a) An Advocate and Solicitor shall not appear in any matter in which he is directly pecuniarily interested.

On this point the Court of Appeal held at p. 37 of the Record of Appeal.

> We are unable to see how an arrangement made in 1990 between the shareholders of the family company Nadchatiram Realties (1960) Sdn Bhd where a reference was made about Saraswathy's entitlement to a quarter share of a piece of land and a statement by her late mother made in December 1985, neither of which were made in contemplation of these two suits which were filed by Vijayalakshmi, against Jegadevan in 1992 and Suseela Devi in 1993, can have any bearing as direct monetary reward or payment to Saraswathy in those suits. There is nothing here to suggest that Saraswathy had received those alleged financial benefits way back in 1990 in contemplation of these two suits. For the prohibition in rule 27(a) of the Practice and Etiquette Rules to apply, it must be shown that the financial benefits of the transaction were received by Saraswathy directly in connection with the two suits.
>
> We, therefore, allow the appeal with the result that the originating summons is dismissed.

In reply the respondent Saraswathy submitted that direct pecuniary must be distinguished with indirect. She said that in Action No. 3 defendant was not the beneficiary of the estate of Nadchatiram Realties Sdn. Bhd. At para. 15.3 of the affidavit, defendant did not claim the 50 acres. We considered the respondent's interest in all these matters. It is clear to us and it could not be denied by her that she was personally related to the parties she was representing.

As regards her direct pecuniary interest, it cannot be denied that there is the subject matter of 50 acres claim, which remains to be resolved and the matters are still active. She also could not deny there is a document where her mother had named her as a beneficiary which remain to be also resolved. It may be, according to her, she is not claiming the 50 acres but other parties may want that to be finally litigated.

Then she admitted she was 5th party in an agreement, whether she likes it or not.

Tuan Haji Sulaiman appeared for the Bar Council and he submitted that the Bar Council was appearing as *amicus curiae*. He referred us to p. 229 where the appellant appointed herself as a liquidator to get the value of the 60 acres of land.

Then at p. 238 para. 13 of the affidavit nowhere is there stated that respondent had any interest.

At p. 239 para. 14 the respondent denies that she had a pecuniary interest. Tuan Haji Sulaiman, however, submitted because the quarrel is a family matter, the Bar Council will not take side.

In conclusion, the respondent submitted that she had no pecuniary interest for example, as stated at p. 524 of the record of appeal, a liquidator had been appointed. She had not been served with any document giving notice of such appointment. Dr. Mahadevan is alleged to have sold 10 acres of the 50 acres of land. She had never received or seen any document giving her notice that he had in fact really sold the 10 acres. Even the family house had been ordered by the court to be re-transferred.

How does this court view the decision of the Court of Appeal? The Court of Appeal hearing the appeal from the decision of the lower court was by way of re-hearing and had all the powers and duties of the High Court. In our case, however, our powers to hear this matter was by way of leave. An appeal from the judgment of the Court of Appeal to this court in civil matters are now controlled by the new s. 96(a) of the Courts of Judicature Act 1964 which provide:

> Subject to any rules regulating the proceedings of the Federal Court in respect of appeals from the Court of Appeal, an appeal shall lie from the Court of Appeal to the Federal Court with the leave of the Federal Court.

In *Datuk Syed Kechik bin Syed Mohamed & Anor v. The Board of Trustees of the Sabah Foundation & Ors and another application* [1999] 1 CLJ 325 Edgar Joseph Jr FCJ held at p. 331:

> The Federal Court as an apex court is a court apart, in the sense that over and above its role as a tribunal of review, it performs the vital function of supervising the process of judicial lawmaking which is such an integral part of our common law system modified by statute.

Once we are seized of this matter by way of leave s. 96(a) of the Courts of Judicature Act 1964 gives us all the powers and duties as enunciated by His Lordship Edgar Joseph Jr in *Datuk Syed Kechik*. His Lordship Edgar Joseph Jr said at p. 332 of *Syed Kechik's* case:

> The paramount consideration is, of course, that the judgment of the Court of Appeal must, in the language of s. 96(a), raise a question of general principle not previously decided by the Federal Court or a decision of importance on which further argument and a decision of the Federal Court would be to public advantage but these criteria are, in our view, not exclusive.

Having considered this appeal before us on the question so framed, we are of the firm view that having regard to the personal relationship of the respondent to those whom she is or was representing and the pecuniary

interest she is alleged to have in those matters, though they were subject to their being litigated in open court, the subject matter of which we express no opinion either way, we are of the firm view that the respondent is prohibited from acting for those persons in view of her personal relationship and of her pecuniary interest by reasons of rr. 3 and 27(a) of the Legal Profession (Practice and Etiquette) Rules 1978.

In saying so we are of the view the Court of Appeal, in their decision to allow the appeal had erred. The Court of Appeal with respect, erred in not focussing their attention to an elementary tenet of construction in finding the meaning of "personal relationship" and "pecuniary interest". Their approach should have been to ask the relevant question, which was, what is the purpose of the rr. 3 and 27(a)? We cite s. 17A of the Interpretation Acts 1948 & 1967:

> 17A. Regard to be had to the purpose of Act.
>
> In the interpretation of a provision of an Act, a construction that would promote the purpose or object underlying the Act (whether that purpose or object is expressly stated in the Act or not) shall be preferred to a construction that would not promote that purpose or object.

The Court of Appeal would have found the answer. The objective of the provision lies in the fact that the Bar had set a high standard of practice. The Bar requires that an advocate and solicitor must be able to give an objective and independent judgment before he embarks on the task of advising a client. Thus the advocate and solicitor would not be in a position to do so if he is bound by ties of personal relationship to his client and tied by pecuniary interest. The mischief to be cured and the intention of the Rules are too clear to be ignored. The provision are too clear to admit of any doubt or dispute. They had been so framed to preserve the integrity of an advocate and solicitor so that he may not be in conflict of interest and by the same token ensures that when he acts for a client he is independent and free *vis-a-vis* both when representing the client and performing his duty as an officer of the court in which he appeared.

In this regard we would apply the decision of *Black v. Taylor* [1993] 3 NZLR 403 where the Court of Appeal in New Zealand held that "the court may prevent a barrister acting as counsel in a matter which he had a conflict of interest, or in which he appeared to have a conflict of interest such that justice would not be seen to be done."

That being our decision, we would answer the question framed that the Court of Appeal with respect, had erred in law in the interpretation of the proper construction of rr. 3 and 27(a) of the Legal Profession (Practice & Etiquette) Rules 1978 and the application of the same against the respondent. That being our decision we allow the appeal and restore the decision of the High Court Seremban dated 23 March 1996 that the respondent be so restrained in all actions except No. 4 with costs here and below. Deposit shall be refunded to the appellant.